


# **Judicial Speech and Conduct in a Post-*White* World**



**Indiana Judicial Conference**

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**Presented By:  
Penny J. White**

# U.S. Constitution

## First Amendment

- “Congress shall make no law abridging the freedom of speech . . . .”
- “Speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values’ and is entitled to special protection.”

*NAACP v. Claiborne Hardware Co.*,  
458 U.S. 886 (1982)

# Public Employees and the First Amendment

- "The state as an employer may restrict the speech of its employees in ways that the state as a sovereign may not restrict the speech of its citizens."

*McAuliffe v. Mayor of New Bedford,*  
29 N.E. 571 (1892)  
(Holmes, J.)

# Public Employees and the First Amendment

- “But, public employees do not shed their constitutional protection when they enter the workplace. Instead those rights must be balanced against the interest of the State as employer in promoting the efficiency of the public services it performs through its employees.”

*Pickering v. Board of Educ.,*  
391 U.S. 563 (1968)

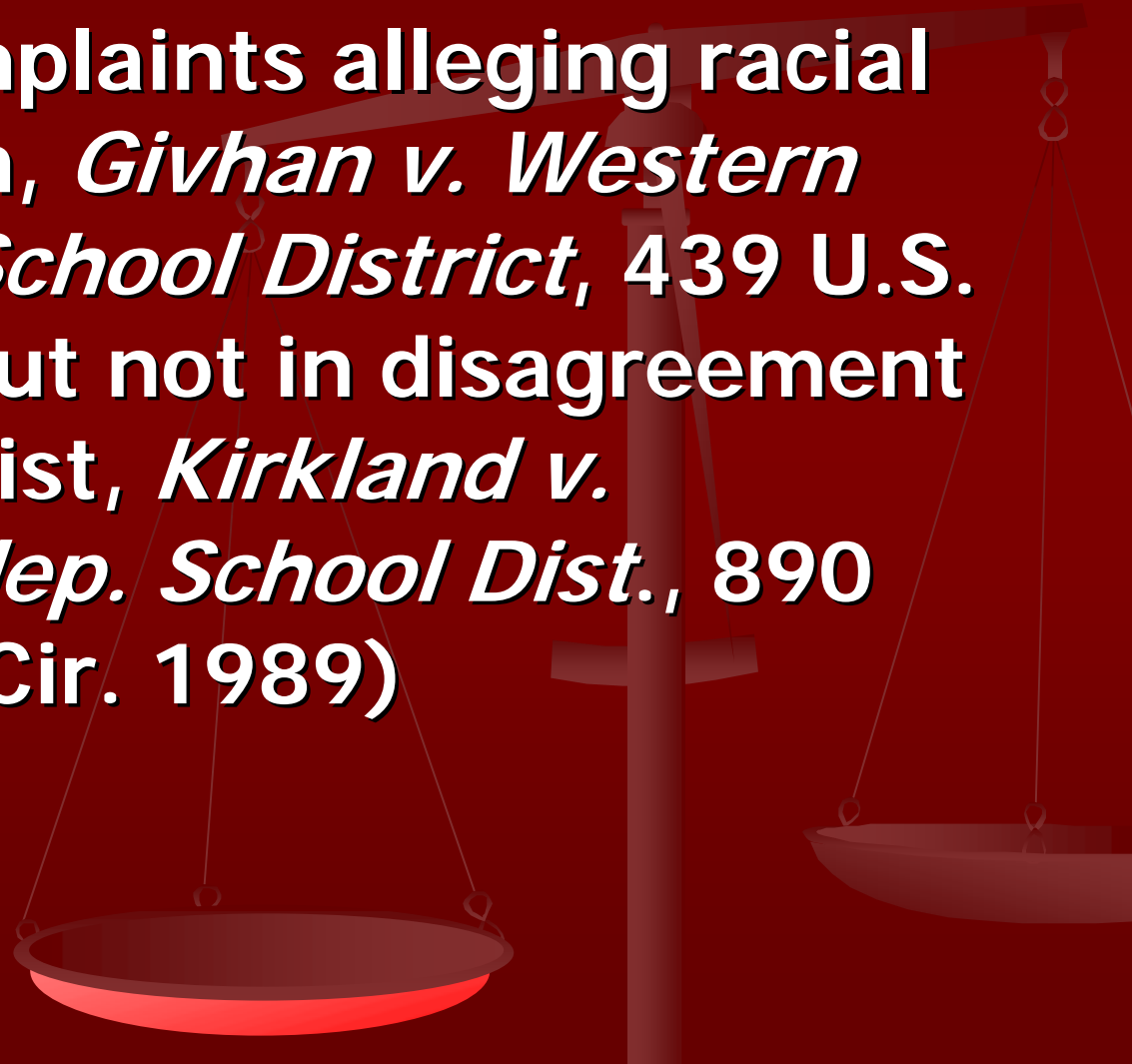
# Public Employees and the First Amendment

- A two-step inquiry is used to evaluate first amendment claims by public employees.
- "First, the court must determine in light of the 'content, form, and context' of the speech in question whether it addresses a matter of 'legitimate public concern.'"
- Second, the court must "balance the employee's first amendment rights against the government's countervailing interest in promoting the efficient performance of its normal functions."

*Pickering*

# Matters of Legitimate Public Interest: Examples & Contrasts

- Teacher's complaints alleging racial discrimination, *Givhan v. Western Line Consol. School District*, 439 U.S. 410 (1979), but not in disagreement over reading list, *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794 (5<sup>th</sup> Cir. 1989)

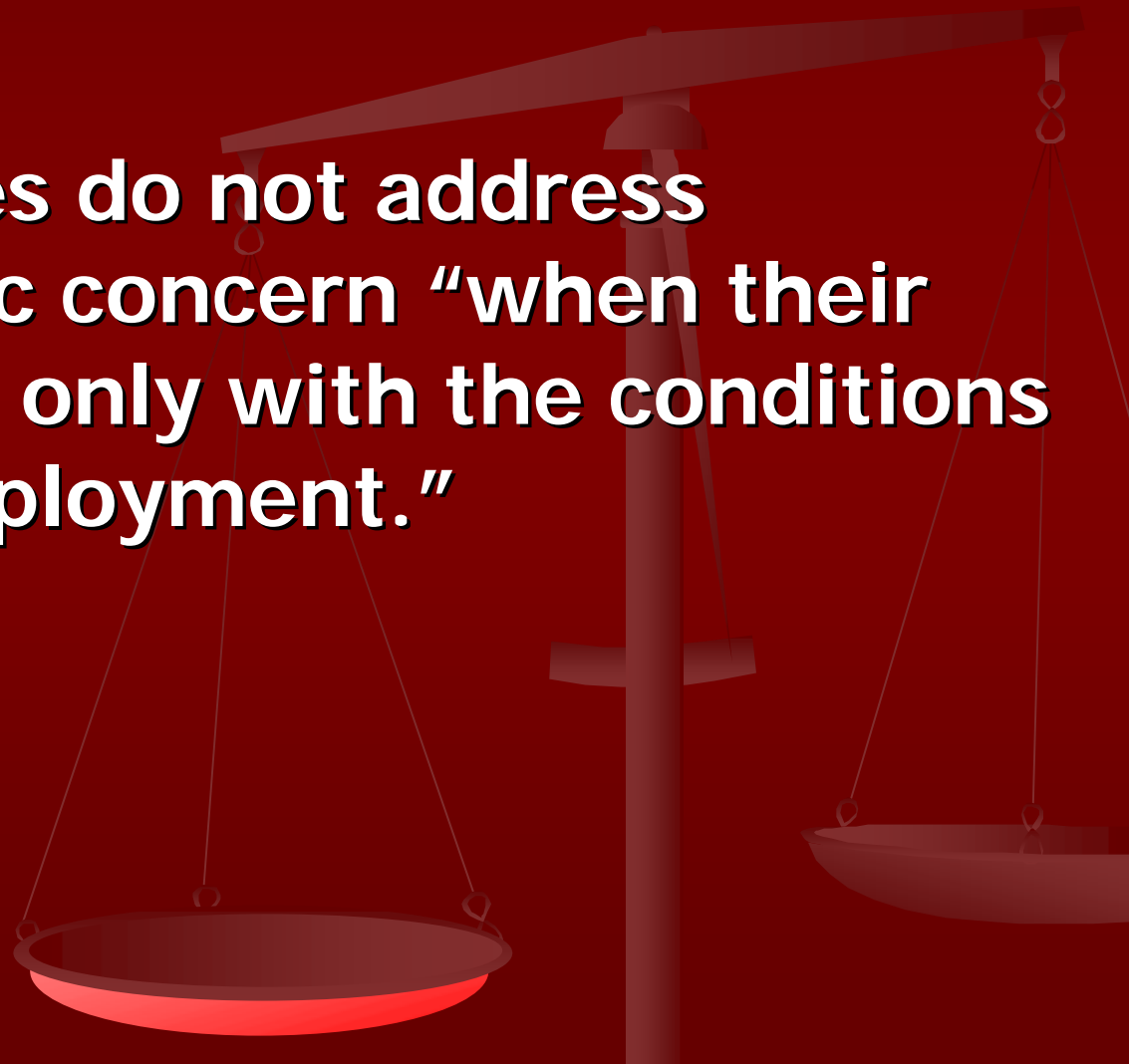


# Matters of Legitimate Public Interest: Examples & Contrasts

- Firefighter's public attack on inadequacy of department's manpower, *Moore v. City of Kilgore*, 877 F.2d 364 (5<sup>th</sup> Cir. 1989) but not DA who circulates questionnaire on morale and policy, *Connick v. Myers*, 461 U.S. 138 (1983)

# Matters of Legitimate Public Interest

- Public employees do not address matters of public concern “when their statements deal only with the conditions of their own employment.”





# Balancing Individual Rights vs. Governmental Interest

- In assessing government interest, courts should consider “whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.”

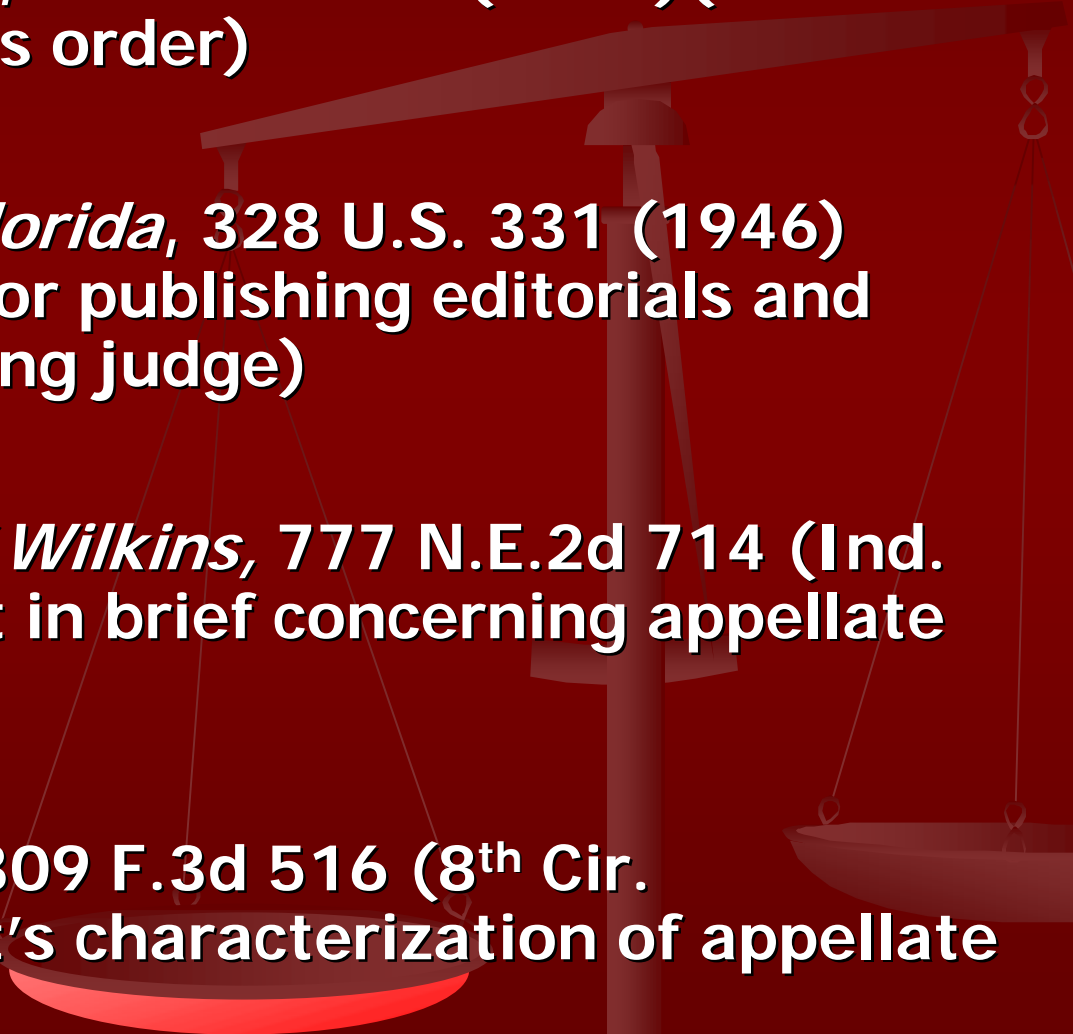
*Pickering*



# New Contours?

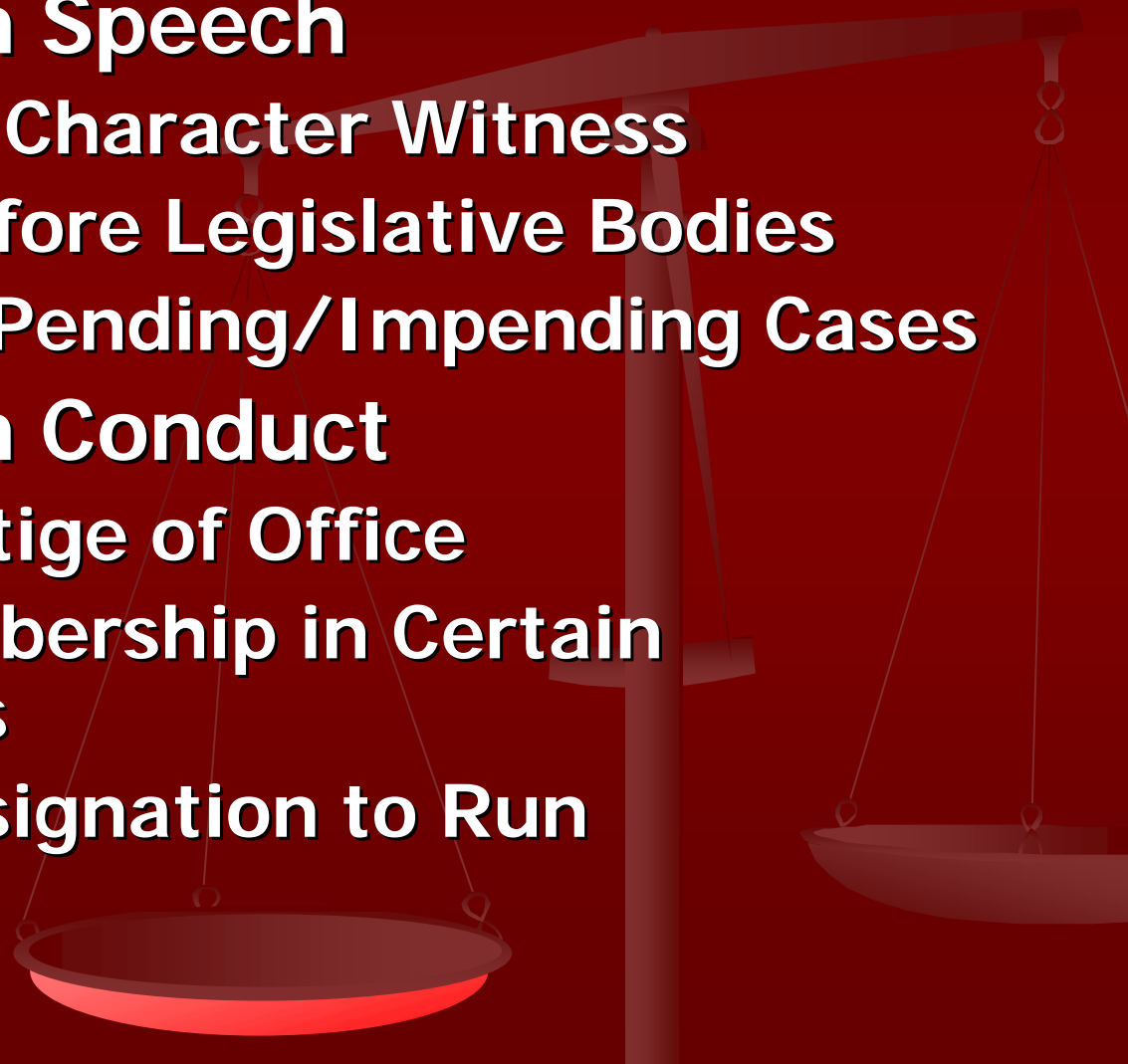
- Is a public employee's purely job-related speech, expressed pursuant to the duties of employment, protected speech when it touches on a matter of public concern?
- Or must the speech to be engaged in "as a citizen" to be protected?
- Court asked to address "the growing inter-circuit conflict on the question of whether a public employee's purely job-related speech is constitutionally protected" since the "lack of uniformity dramatically impacts the ability of public employers to effectively manage their respective agencies"
- *Garcetti v. Ceballos*, 361 F.3d 1168 (9<sup>th</sup> Cir.2004), *cert. granted*
- Argument heard October 12, 2005

# Speech about Sitting Judges

- By private citizens
    - *Wood v. Georgia*, 370 U.S. 375 (1962) (sheriff criticizing judge's order)
  - By the press
    - *Pennekamp v. Florida*, 328 U.S. 331 (1946) (newspaper editor publishing editorials and cartoons criticizing judge)
  - By lawyers
    - *In the matter of Wilkins*, 777 N.E.2d 714 (Ind. 2002) (comment in brief concerning appellate court decision)
  - By other judges
    - *Moran v. Clark*, 309 F.3d 516 (8<sup>th</sup> Cir. 2002) (trial court's characterization of appellate court opinion)
- 

# **Ethics Provisions Related to Speech and Conduct by Sitting Judges**

- **Limitations on Speech**
  - Testimony as Character Witness
  - Testimony before Legislative Bodies
  - Comment on Pending/Impending Cases
- **Limitations on Conduct**
  - Utilizing Prestige of Office
  - Limiting Membership in Certain Organizations
  - Requiring Resignation to Run



# Speech by Sitting Judges

- “We [note] that the state’s interest in suppressing [the judge’s] criticisms is much weaker than in the typical public employee situation as [the judge] was not, in the traditional sense of that term, a *public employee*. [The judge] was not hired by a governmental employer. Instead, he was an elected official, chosen directly by the voters of his judicial precinct, and, at least in ordinary circumstances, removable only by them.”

*Scott v. Flowers*, 910 F.2d 201 (5<sup>th</sup> Cir. 1990)

# Speech by Sitting Judges

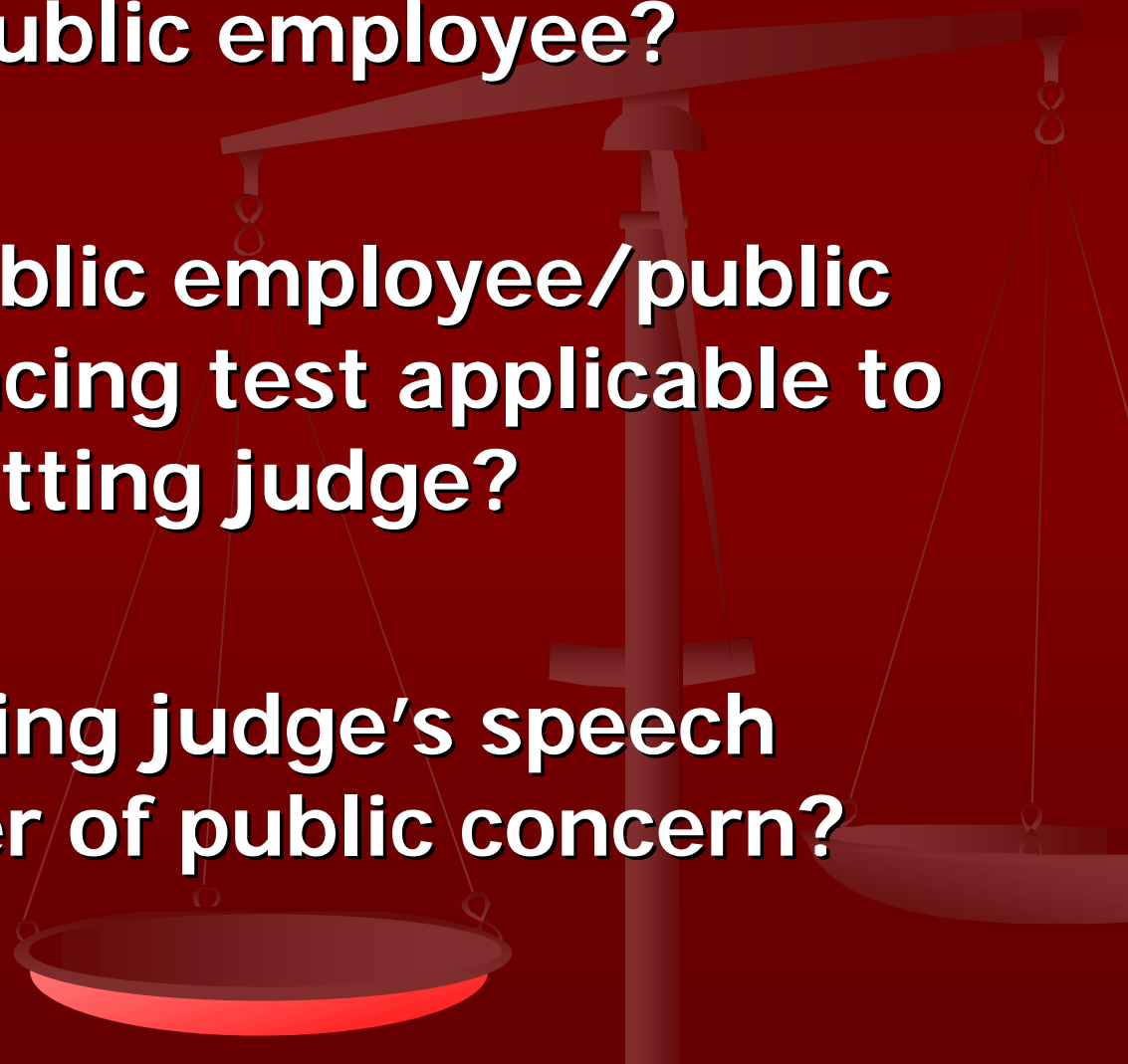
- *Griffen v. Ark. Judicial Discipline & Disability Comm'n.*, 130 S.W.3d 524 (Ark. 2003) – testimony before legislative caucus about coach's firing – admonishment stands
- *Miss. Comm'n on Judicial Performance v. Wilkins*, 876 So.2d 1006 (Miss. 2004) – letter to editor concerning religious beliefs – discipline disallowed
- *In re Disciplinary Proceedings against Sanders*, 955 P.2d 369 (Wash. 1998)- speech at pro-life rally – discipline disallowed

# Speech by Sitting Judges

- "[A] person does not surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office. We see no reason why the same principles should not apply to speech by a sitting judge, albeit with somewhat less force. In a system in which judges are elected, they are, in effect, always seeking reelection. If a person does not completely surrender his or her right to freedom of speech upon becoming a candidate, then we cannot expect the candidate to do so once elected to judicial office.
- *ACLU v. Florida Bar*, 744 F.Supp. 1094 (N.D. Fla. 1990).

# Judge as Public Employee

- Is a judge a public employee?
- Should the public employee/public concern balancing test applicable to speech by a sitting judge?
- When is a sitting judge's speech about a matter of public concern?





# Speech v. Conduct by Sitting Judges: Different Standards?

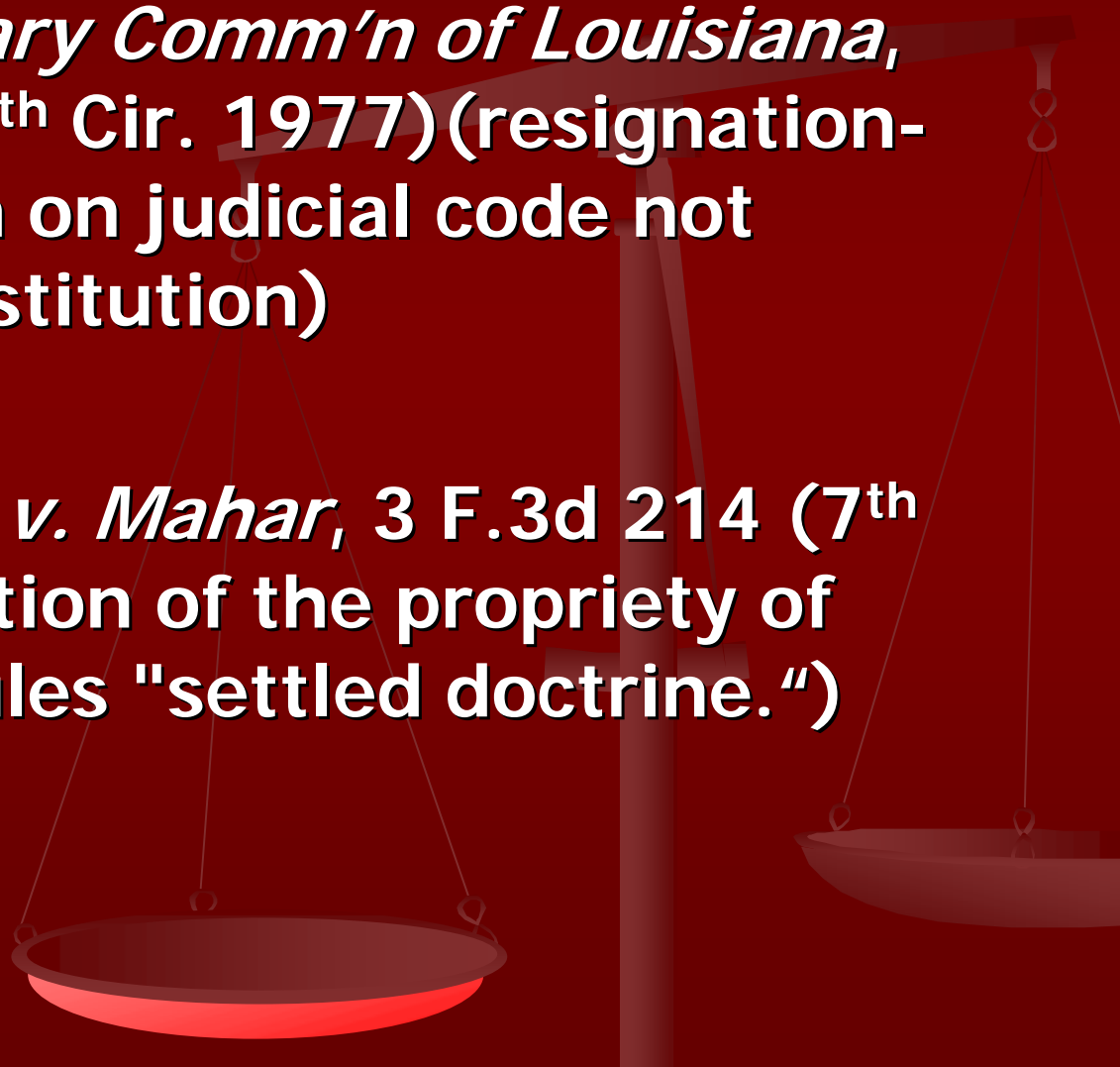
- "The state may restrict the speech of elected judges in ways that it may not restrict the speech of other elected officials."
  - *Morial v. Judiciary Comm'n of La.*, 565 F.2d 295 (5<sup>th</sup> Cir. 1977)
- "*Morial's* standard applies to conduct, not speech, and a higher standard [may] immunize statements."
  - *In re Kaiser*, 759 P.2d 392 (Wash. 1988)

# Limits on Speech and Conduct by Sitting Judges: Speech

- *In re Baker*, 542 P.2d 701 (1975) (statement about opponent's health and capacity to serve not violative of canons)
- *In re Riley*, 691 P.2d 695 (Ariz. 1984) (judge disciplined for making statements prejudicial to the administration of justice)

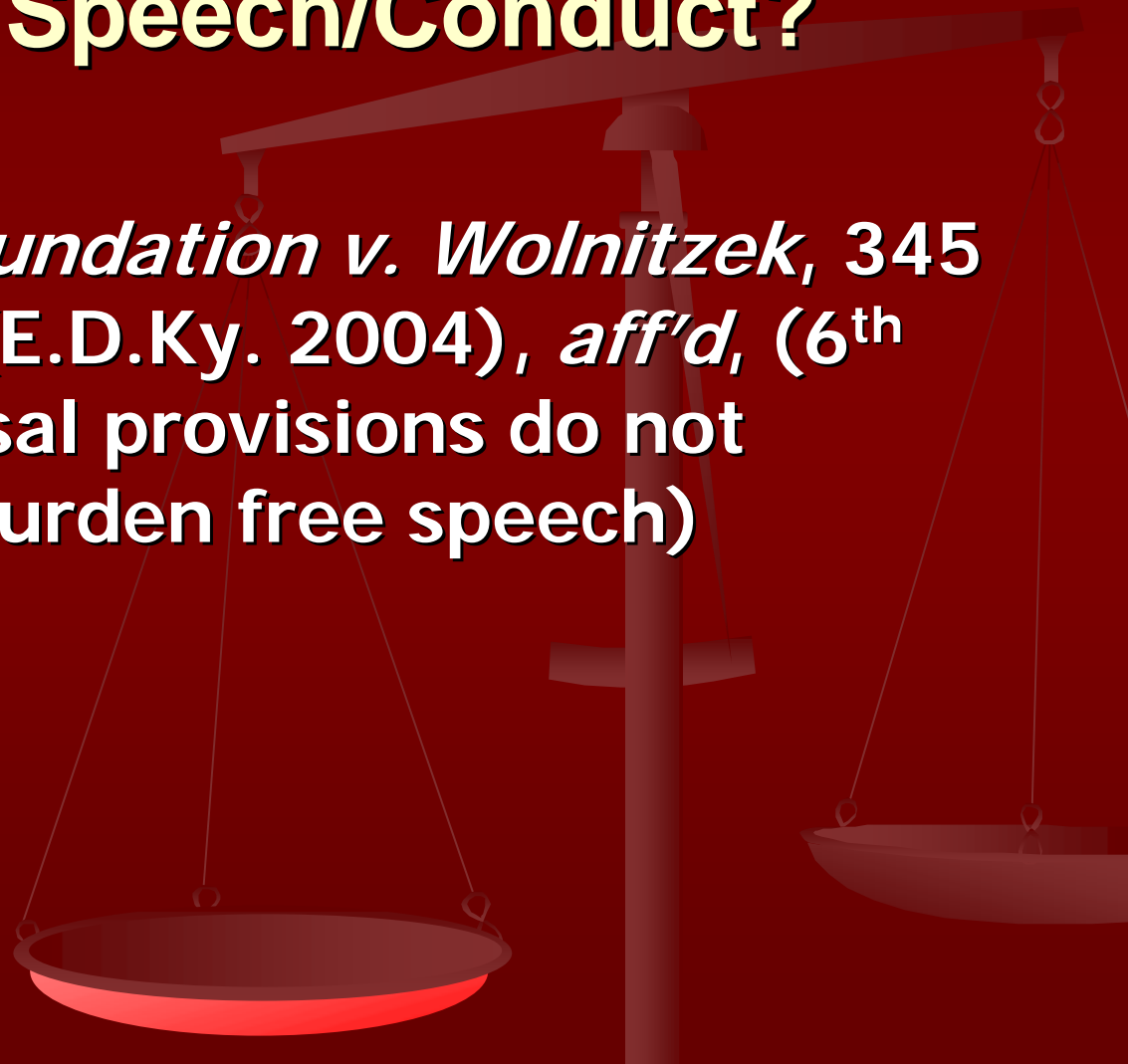
# Limits on Speech and Conduct by Sitting Judges: Conduct

- *Morial v. Judiciary Comm'n of Louisiana*, 565 F.2d 295 (5<sup>th</sup> Cir. 1977) (resignation-to-run provision on judicial code not violative of Constitution)
- *See also Wilbur v. Mahar*, 3 F.3d 214 (7<sup>th</sup> Cir. 1993) (question of the propriety of resign-to-run rules "settled doctrine.")

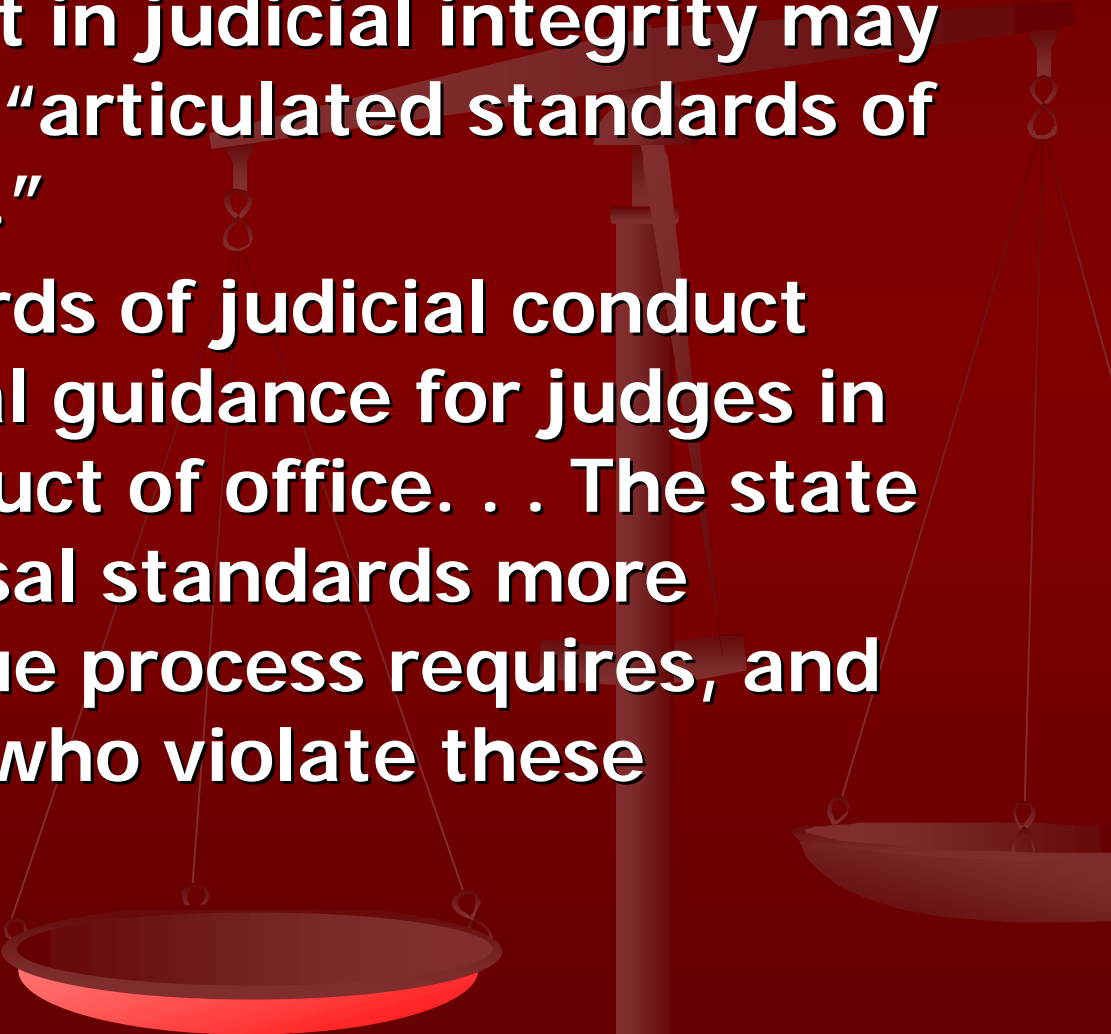


# Limits on Speech and Conduct by Sitting Judges: Recusal – Speech/Conduct?

- *Family Trust Foundation v. Wolnitzek*, 345 F.Supp.2d 672 (E.D.Ky. 2004), *aff'd*, (6<sup>th</sup> Cir. 2005)(recusal provisions do not impermissibly burden free speech)



# Recusal – *White* concurrence

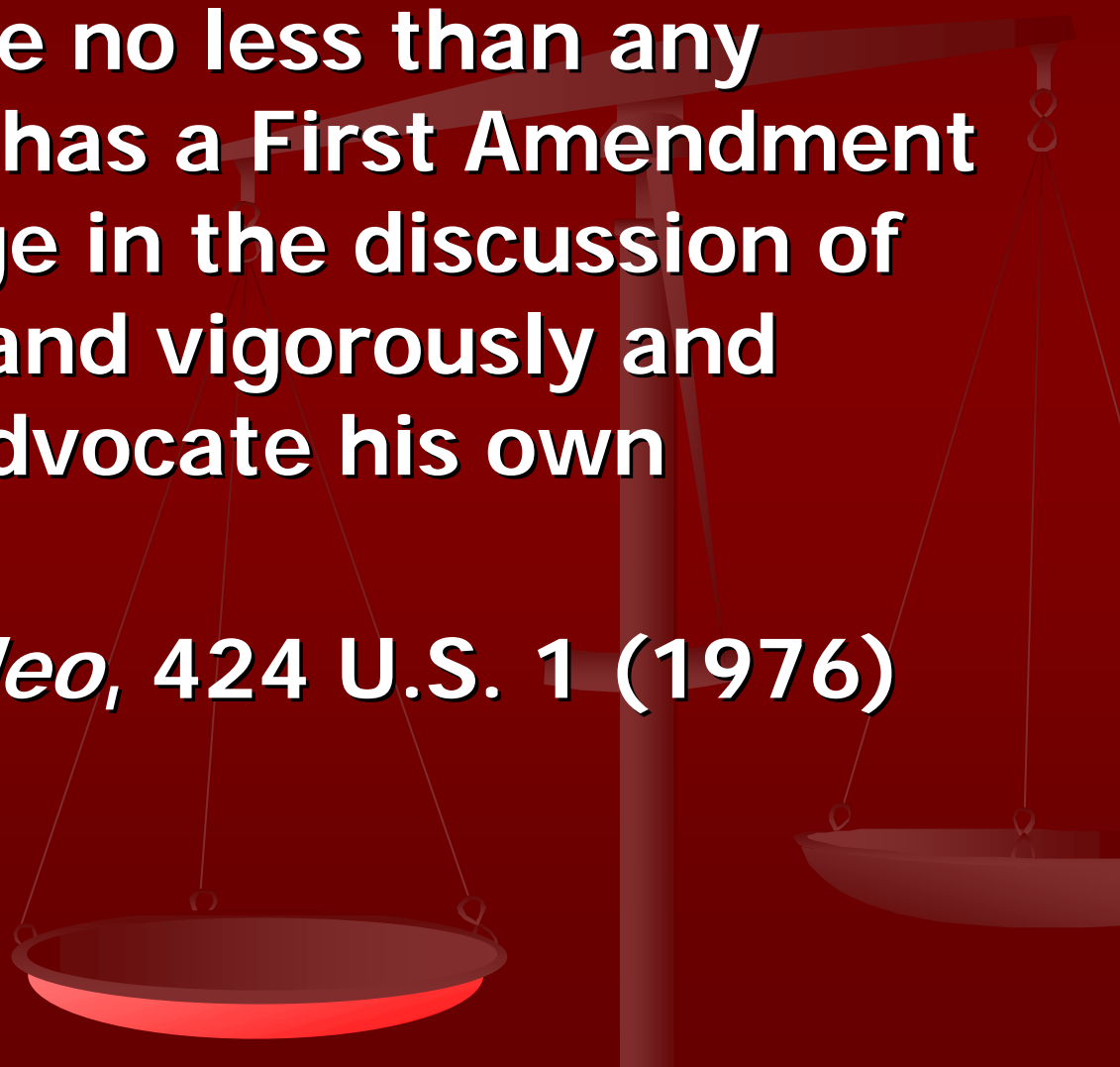
- A state's interest in judicial integrity may be protected by "articulated standards of judicial conduct."
  - "Explicit standards of judicial conduct provide essential guidance for judges in the proper conduct of office. . . The state may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."
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# Recusal – *White* concurrence

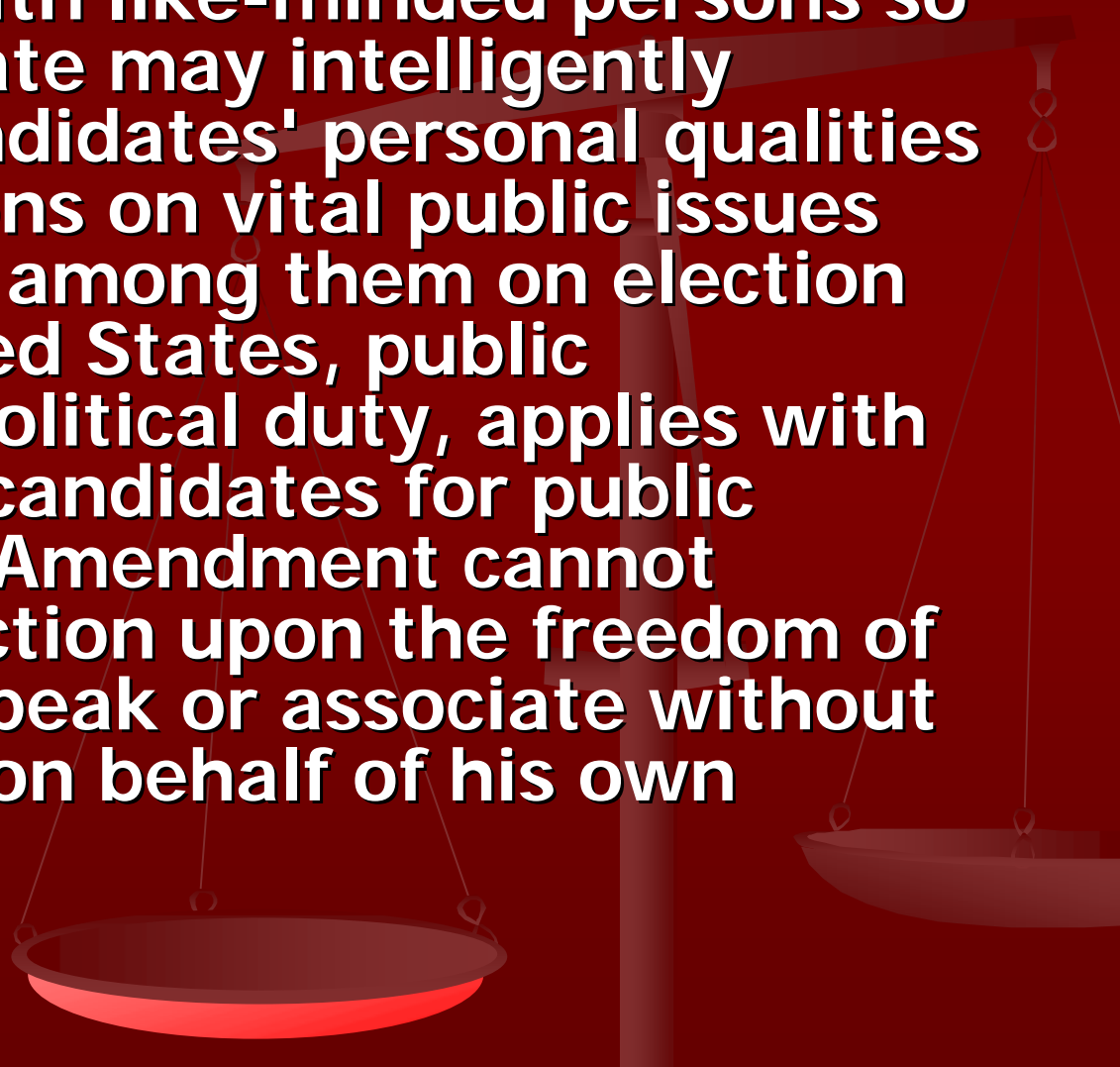
- “This case does not present the question whether a State may restrict the speech of judges because they are judges – for example, as part of a code of judicial conduct. Whether the rationale of [*Pickering and Connick*] could be extended to allow a general speech restriction of sitting judges . . . In order to promote the efficient administration of justice, is not an issue raised here.”

# “Core Political Speech”

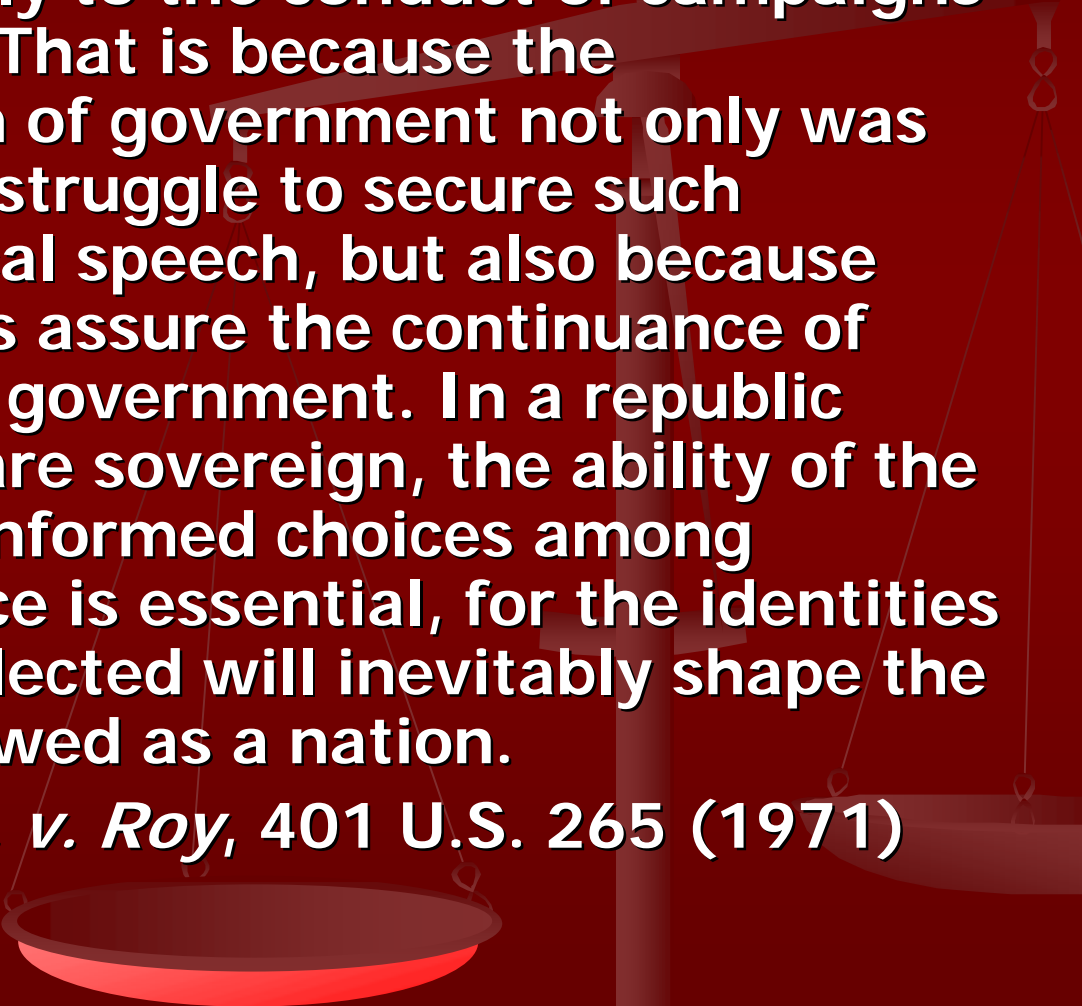
- “The candidate no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election.”
- *Buckley v. Valeo*, 424 U.S. 1 (1976)



- Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known and associate with like-minded persons so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. In the United States, public discussion is a political duty, applies with special force to candidates for public office. The First Amendment cannot tolerate a restriction upon the freedom of a candidate to speak or associate without legislative limit on behalf of his own candidacy.
- *Buckley, supra*





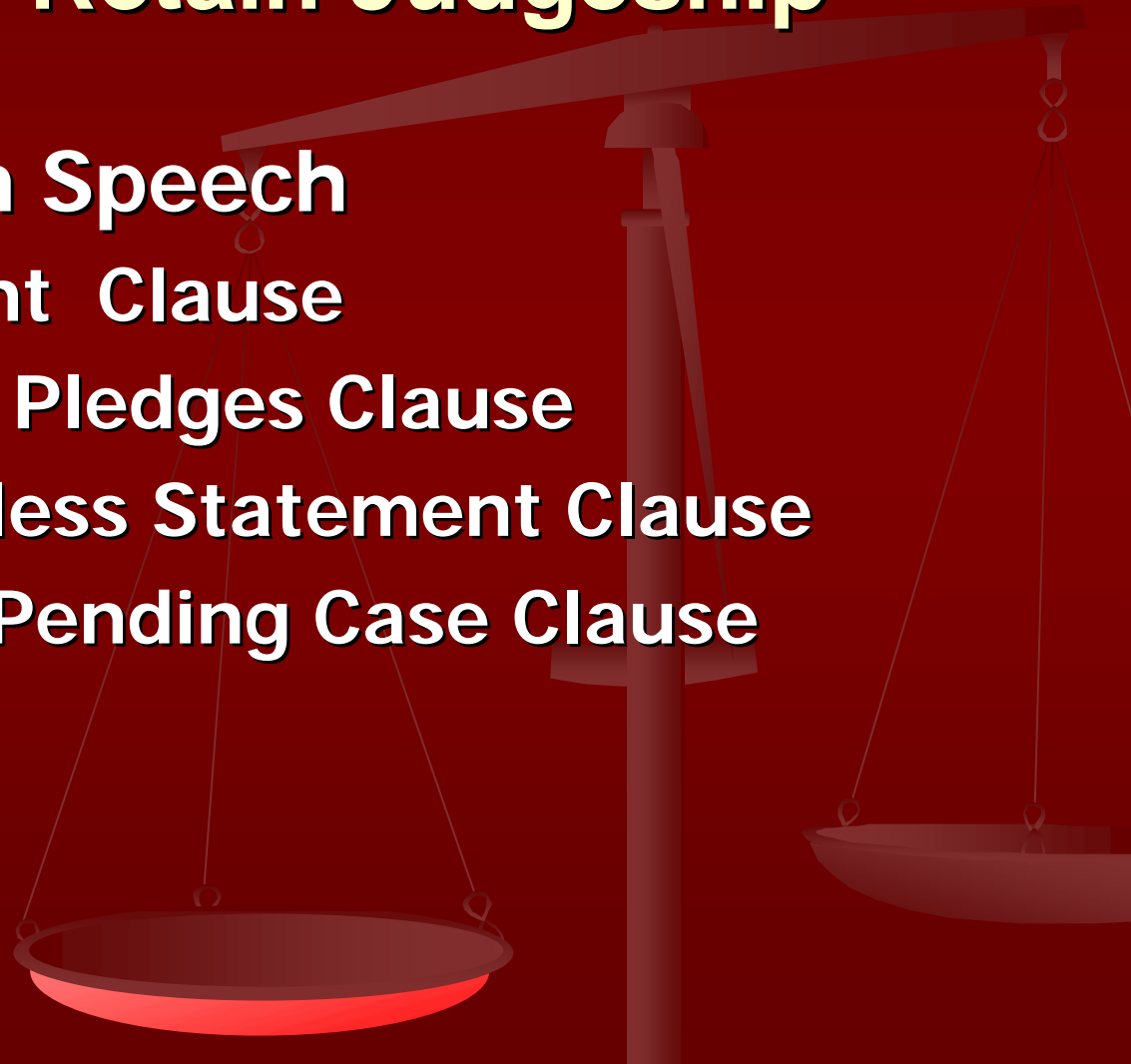
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- Protection of political speech is the very stuff of the First Amendment. It can hardly be doubted that the constitutional guarantee of the freedom of speech has its fullest and most urgent application precisely to the conduct of campaigns for political office. That is because the constitutional form of government not only was borne of the great struggle to secure such freedoms as political speech, but also because such freedom helps assure the continuance of that constitutional government. In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that is followed as a nation.
  - *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971)

# **“Core Political Speech”**

- **“Debate on the qualifications of candidates is at the core of the electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance. It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign. The United States Supreme Court has never allowed the government to prohibit candidates from communicating relevant information to voters during an election. ”**

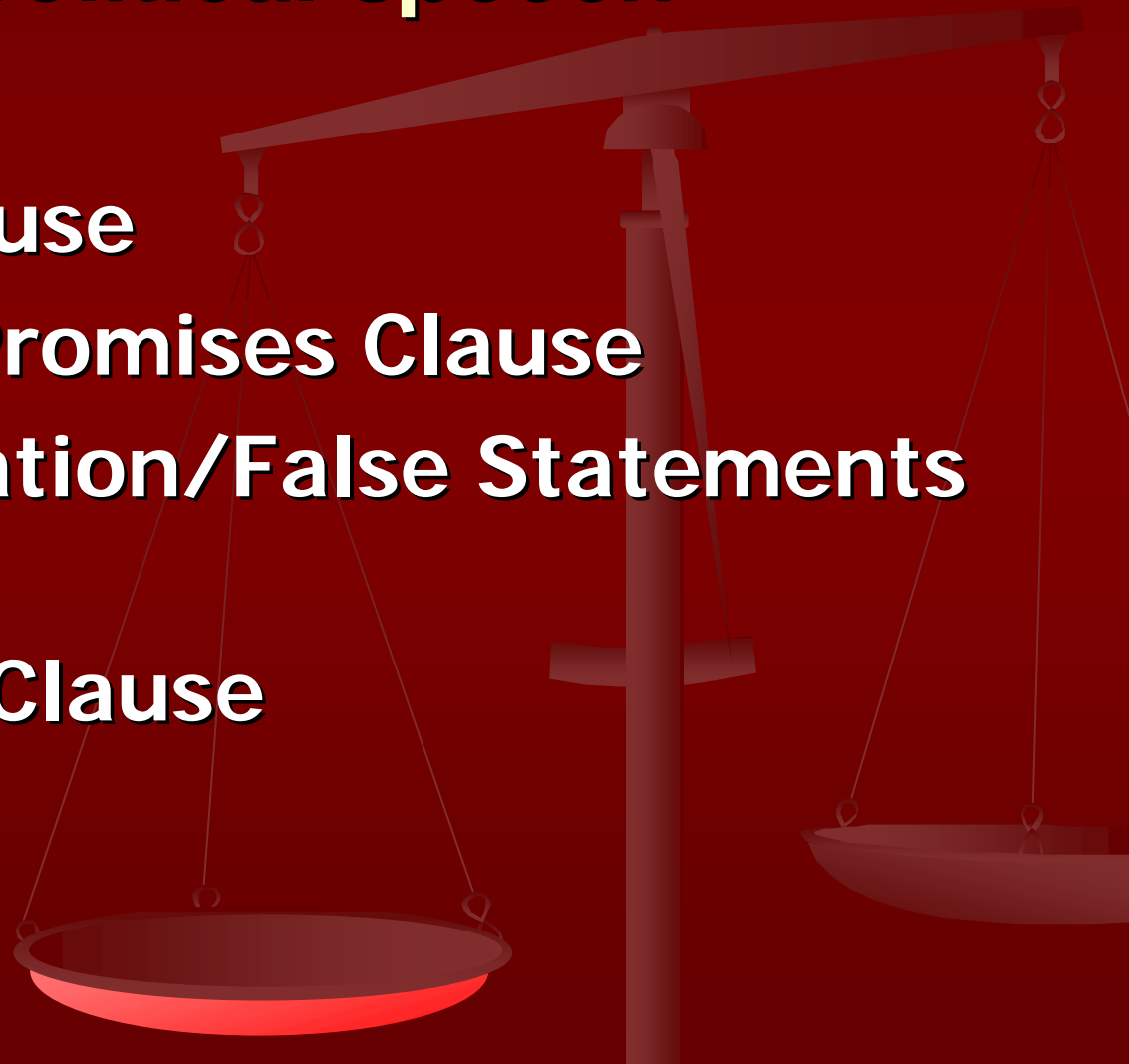
# **Ethics Provisions Related to “Core Political Speech” Used by Judges to Acquire or Retain Judgeship**

- **Limitations on Speech**
  - **Announcement Clause**
  - **Promises and Pledges Clause**
  - **False or Reckless Statement Clause**
  - **Comment on Pending Case Clause**



# **Provisions of the Code of Judicial Conduct, before revision, impacting judicial political speech**

- **Announce Clause**
- **Pledges and Promises Clause**
- **Misrepresentation/False Statements Clause**
- **Commitment Clause**



# ***Republican Party of Minnesota v. White,*** **536 U.S. 765 (2002)**

- **Justice Scalia majority**
  - “Announce” clause of Minnesota Code violates First Amendment rights of those seeking the bench; separate “pledges and promises clause . . . is not challenged here and [upon it] we express no view.”
- **Justice O'Connor concurrence**
  - “[T]he State has voluntarily taken on the risk[] to judicial bias.”
- **Justice Kennedy concurrence**
  - “Legislative bodies, judicial committees, and professional associations have the right to promulgate standards of judicial conduct, [yet] these standards may not be used by the State to abridge the speech of aspiring judges in a judicial campaign.”

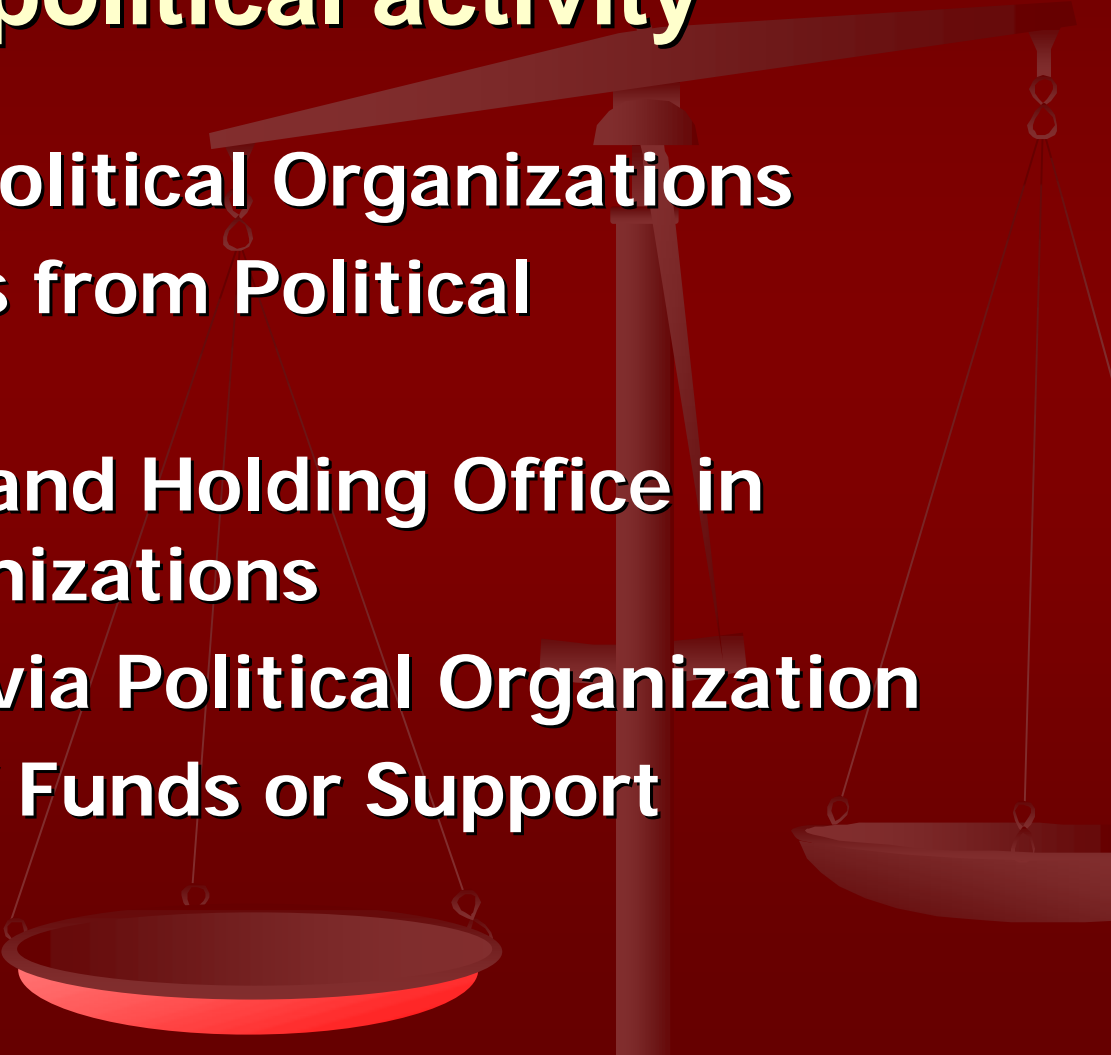
# Political Speech by Aspiring Judges & Judges Seeking Reelection

- *In re Kinsey*, 842 So.2d 77 (Fla. 2003), *cert. denied*, 540 U.S. 825 (2003) (judge fined \$50k and reprimanded for campaign statements violating promises, pledges, and commitment provisions)
- *In re Watson*, 794 N.E.2d 1 (N.Y. 2003) (judge sanctioned for campaign statements that violated pledges and promises clause)

# Political Speech by Aspiring Judges & Judges Seeking Reelection

- *Weaver v. Bonner*, 309 F.3d 1312 (11<sup>th</sup> Cir. 2003)(no cert. requested) (charged with violation of canon prohibiting false statements )
- *Smith v. Phillips*, 2002 WL 1870038 (W.D. Tex. 2002)(charged with violation of canon prohibiting statements on opinions of issues subject to judicial interpretation)

# **Provisions of the Code of Judicial Conduct, before revision, impacting judicial political activity**

- **Speeches to Political Organizations**
  - **Endorsements from Political Organizations**
  - **Participation and Holding Office in Political Organizations**
  - **Fund Raising via Political Organization**
  - **Solicitation of Funds or Support**
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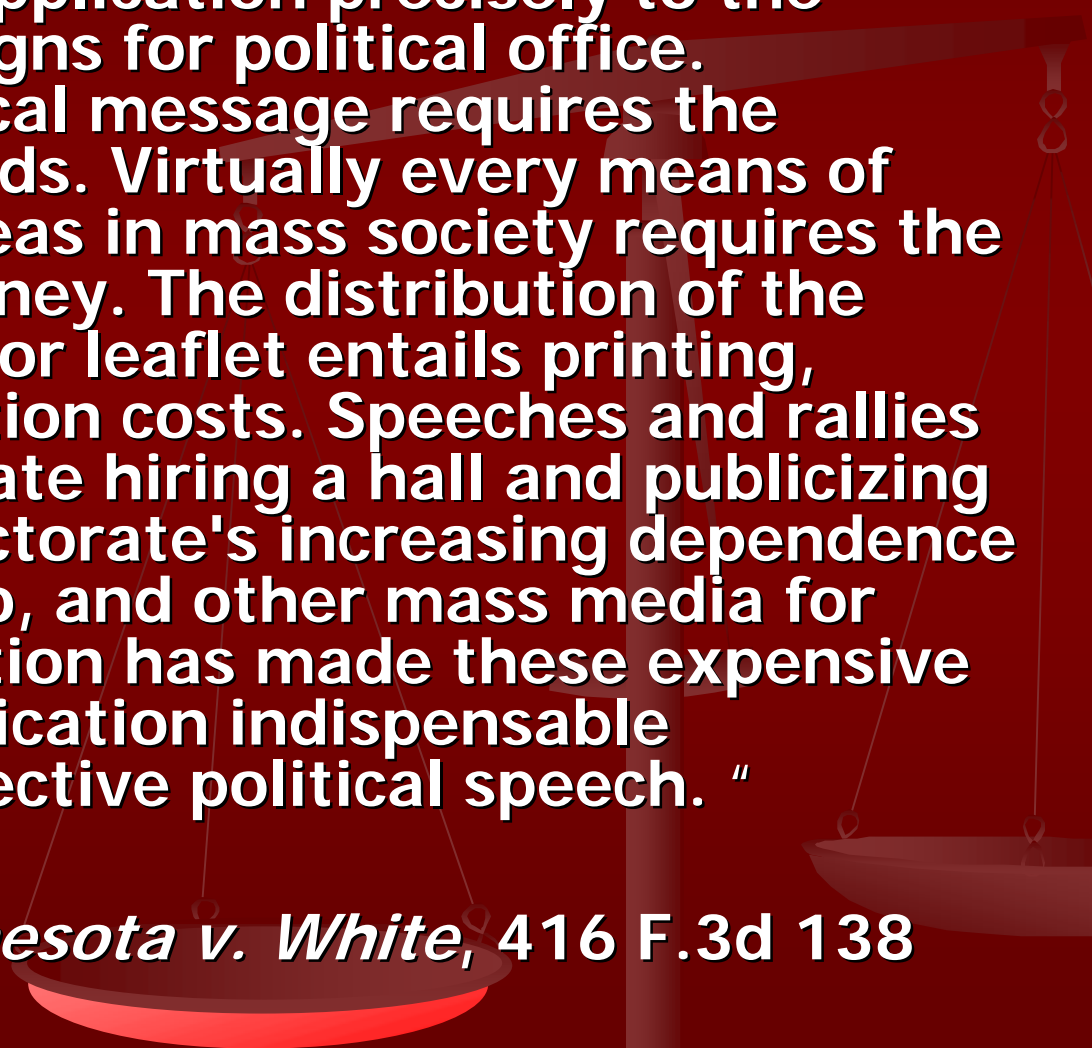


# Political Activity by Aspiring Judges & Judges Seeking Reelection

- *In re Raab*, 793 N.E.2d 1287, 2003 N.Y. (N.Y. 2003) (charged with violating political activity rules, defended)
- *Spargo v. N.Y. State Comm'n of Judicial Conduct*, 351 F.3d 65 (2<sup>nd</sup> Cir. 2003), cert. denied, 124 S.Ct. 2812 (2004) (charged with violation of political activity provisions)

# Core Political Activity

- A provision that prohibits judicial candidates from personally soliciting campaign contributions and from personally soliciting publicly stated support, but allows the candidate's election committee to engage in these activities is unconstitutional. "In effect, candidates are completely chilled from speaking to potential contributors and endorsers about their potential contributions and endorsements."
- "Restricting speech based on its subject matter triggers the same strict scrutiny as does restricting core political speech."

- 
- Financial solicitation is speech requesting funds to be used in promoting a political message.
  - “It can hardly be doubted that the constitutional guarantee of the freedom of speech has its fullest and most urgent application precisely to the conduct of campaigns for political office. Promoting a political message requires the expenditure of funds. Virtually every means of communicating ideas in mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. ”
  - *Rep. Party of Minnesota v. White*, 416 F.3d 138 (8<sup>th</sup> Cir. 2005)

# Core Political Activity

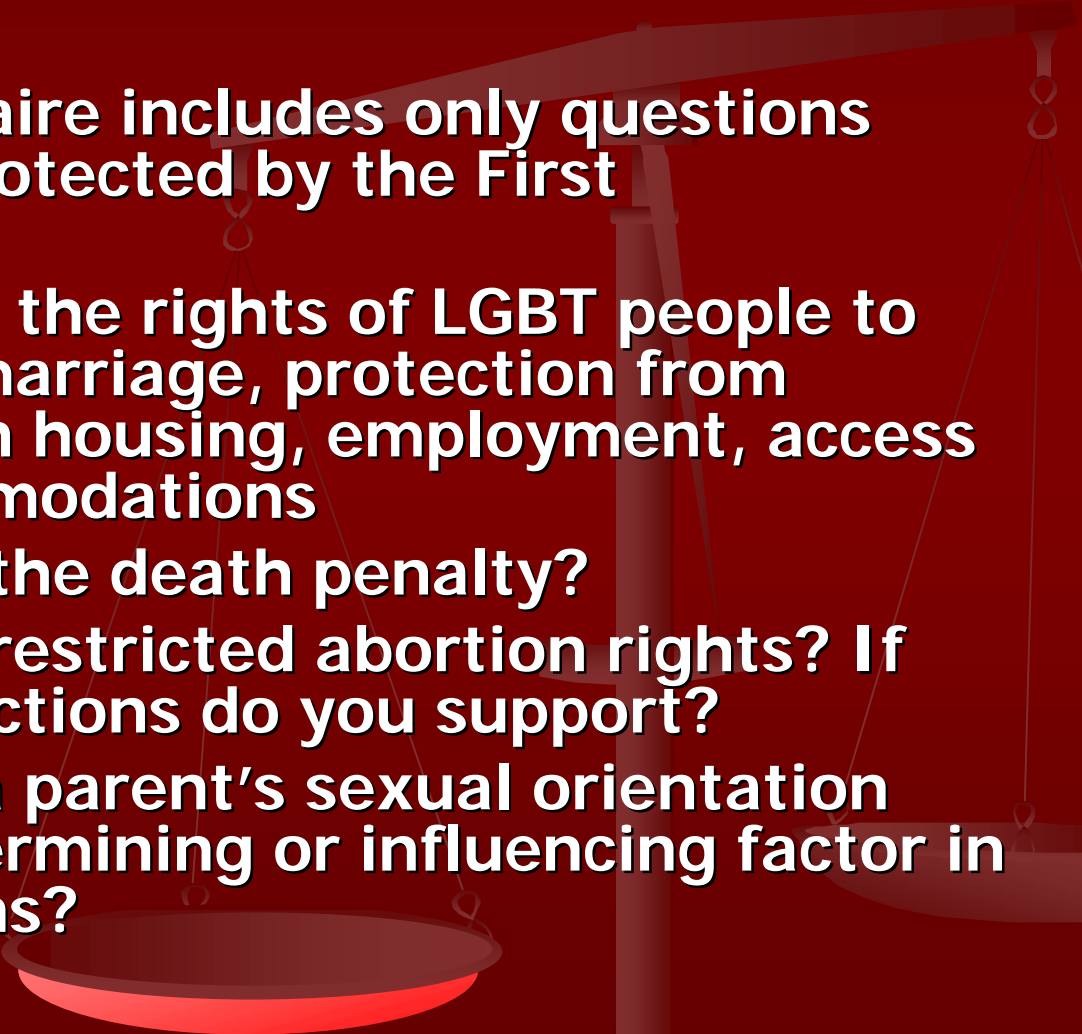
- *Republican Party of Minnesota v. White*, 416 F.3d 738 (8<sup>th</sup> Cir. 2005), *cert. denied*, *Dimick v. Republican Party of Minnesota*, 126 S.Ct. 1165 (2006)



# The New Landscape: Litigation

- *North Dakota Family Alliance, Inc., v. Bader*, 2005 WL 638321, (D.N.D., Mar 21, 2005)
- *Christian Coalition of Alabama v. Cole*, 355 F.3d 1288(11<sup>th</sup> Cir. 2004)
- *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5<sup>th</sup> Cir. 2002), cert. denied, 537 U.S. 1018 (2002)
- *Family Trust Foundation of Ky., Inc. v. Ky. Judicial Conduct Comm'n*, 388 F.2d 224 (6<sup>th</sup> Cir. 2004)

# The New Landscape

- Questionnaires with Legal Opinions
    - "This questionnaire includes only questions with answers protected by the First Amendment."
    - "Do you support the rights of LGBT people to the following? marriage, protection from discrimination in housing, employment, access to public accommodations"
    - Do you support the death penalty?
    - Do you support restricted abortion rights? If so, which restrictions do you support?
    - Do you believe a parent's sexual orientation should be a determining or influencing factor in custody decisions?
- 

# More Questions

- “You’ve got Ten Commandments; you’ve got Ten Questions.”
  - Are you a born-again Christian? Give your testimony?
  - Will you pledge to post the Ten Commandments in your courtroom?
  - Do you agree that God’s laws have a higher authority than laws enacted by the \_\_\_\_ legislature or U.S. Congress?
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# The New Landscape: More Litigation

- North Carolina Public Financing - *Jackson v. Leake*
- Recusal Provisions
- Limits on Special Interest Fundraising and Expenditures – *Randall v. Sorrell*





# Reactions

- ABA Joint Commission to Evaluate the Model Code of Judicial Conduct – [www.abanet.org/judicialethics/about/background.html](http://www.abanet.org/judicialethics/about/background.html)



# Reactions: Indiana Preliminary Advisory Opinion #1-02

- Commission will continue to enforce rule requiring candidates to
  - Maintain dignity appropriate to office [Canon5]
  - Act consistently with integrity and independence of judiciary [5A(3)(a)]
  - Not make pledges and promises of conduct in office [5A(3)(d)(i)]
  - Not make statements that commit or appear to commit the candidate with respect to cases likely to come before the court [5A(3)(d)(ii)]
  - Not knowingly misrepresent facts about the candidate or opponent [5A(3)(d)(iii)]

# Indiana Preliminary Advisory Opinion #1-02: Ask for help

- “Many issues about campaign speech will require ad hoc analysis. In that regard, judicial candidates are encouraged to contact the Commission directly and in advance to discuss the propriety of their campaign statements, or to discuss the appropriateness of their opponents’ statements and the proper responses to those statements.”

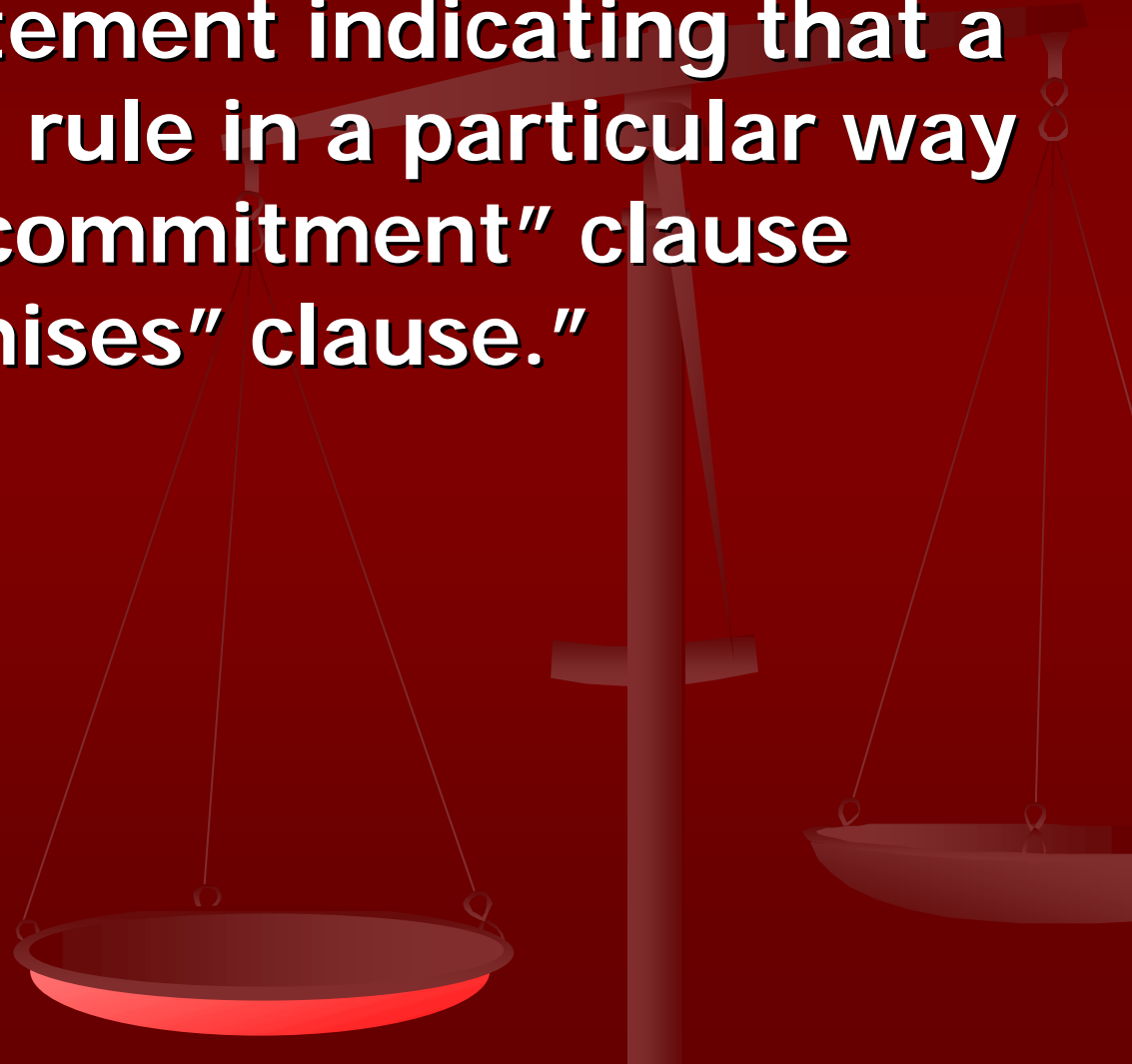
# Indiana Preliminary Advisory

## Opinion #1-02: Specific Campaign Statements

- "As a judicial candidate makes more specific campaign statements relating to issues which may come before the courts . . . the candidates incurs the risk of violating the "commitment" clause and/or the "promises" clause. And even where those clauses are not violated, the candidates' statements may invite future recusal requests, or even mandate recusal in future cases."

# Indiana Preliminary Advisory Opinion #1-02: Commitment Clause

- “Clearly a statement indicating that a candidate will rule in a particular way violates the “commitment” clause and the “promises” clause.”

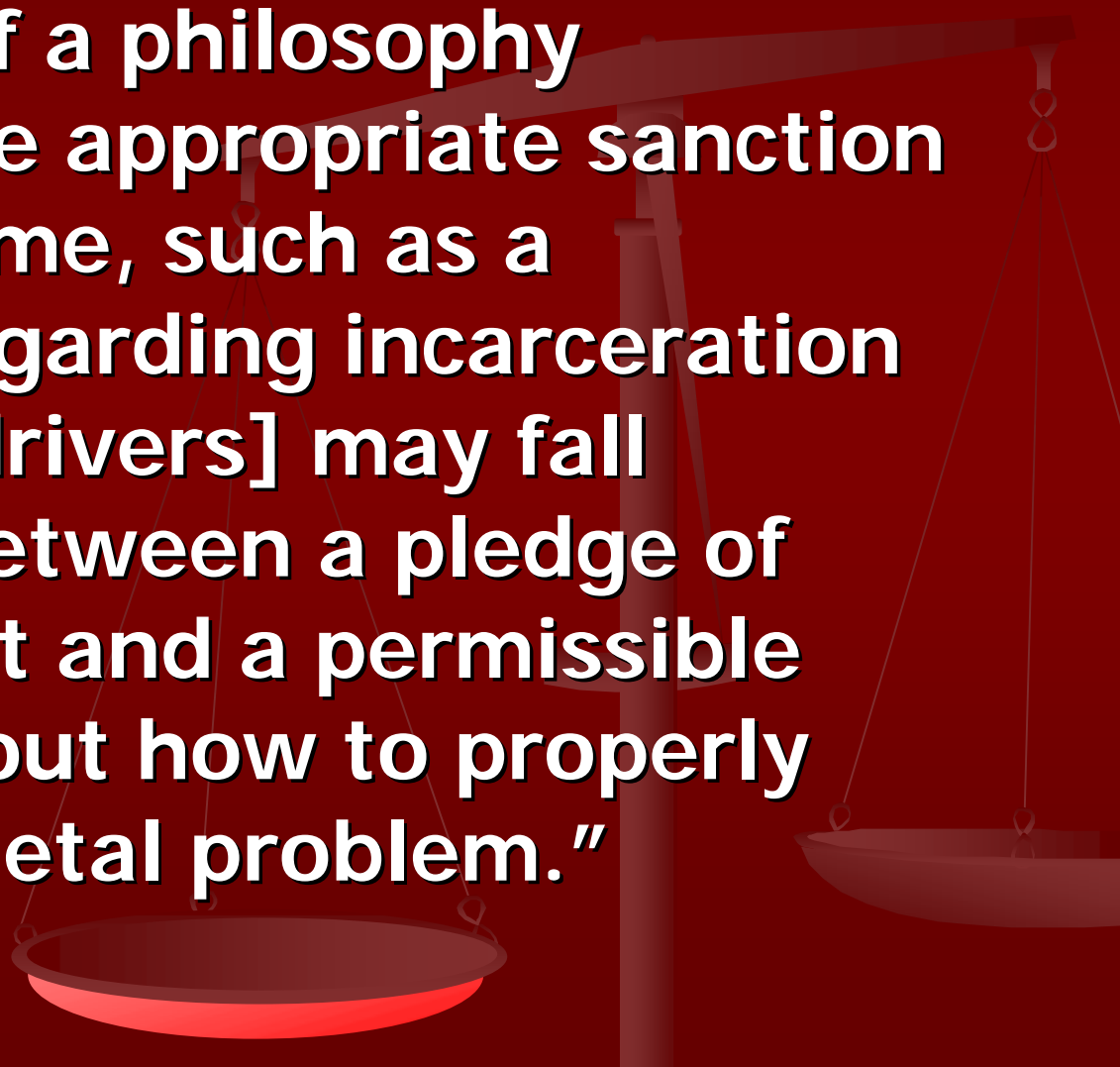


# Indiana Preliminary Advisory Opinion #1-02: Implied Promises

- "A statement which appears to constitute a mere expression of fact, such as a candidate's reference to a record of imposing harsh penalties in criminal cases, may be deemed an implied promise of future conduct . . . Such a statement will be looked upon . . . with disfavor, as it likely represents a bias against criminal defendants who later may appear before the candidate."

# Indiana Preliminary Advisory Opinion #1-02: Philosophies

- “Expression of a philosophy concerning the appropriate sanction for certain crime, such as a statement [regarding incarceration for all drunk drivers] may fall somewhere between a pledge of future conduct and a permissible statement about how to properly address a societal problem.”



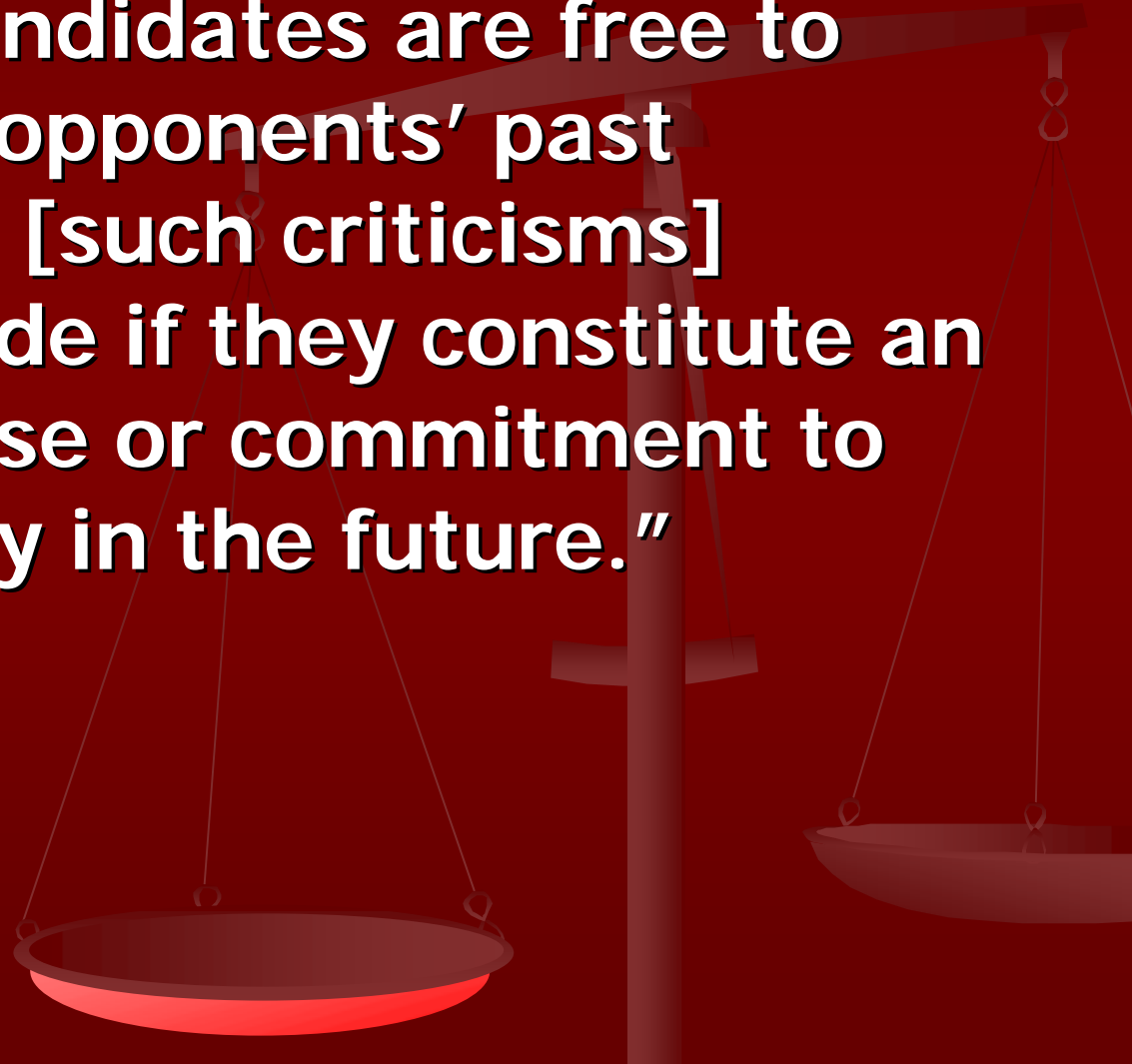
# Indiana Preliminary Advisory Opinion #1-02: Criticism of Opponent

- "A candidate may criticize an opponent's qualifications or record, so long as the criticism is based on objective facts; otherwise the candidate violates the rule against misrepresentation. . . . [L]abeling one's opponent . . . tends to mislead the voters and violate the Code. A candidate willing to label the opponent . . . must have an objective, demonstrable basis for the description. A far safer approach . . . is to avoid broad labels and to state the facts on which the criticism is based."



# Indiana Preliminary Advisory Opinion #1-02: Criticizing past decisions

- “Generally, candidates are free to criticize their opponents’ past decisions, but [such criticisms] violate the Code if they constitute an implied promise or commitment to rule differently in the future.”



# Indiana Preliminary Advisory Opinion #1-02: Truthful Criticism

- “Of course, truthful statements of fact about one’s opponent are permissible.”



# Indiana Preliminary Advisory Opinion #1-02: Misleading literal facts

- “In some instances a statement of literal fact may be misleading.”



# Indiana Preliminary Advisory Opinion #1-02: Permissible Promises

- “Canon 5A(3)(d)(i), which states that a candidate may not make pledges or promises of conduct in office other than the fair and impartial performance of the duties of the office does not limit the candidate to that simple pledge. Any number of specific promises relating to court administration or the improvement of the judicial system are appropriate.”

- **"Every judge has a choice – to exercise fully his or her First Amendment right and to seek refuge in the Constitution when complaints are raised or to forsake the exercise of personal freedom for a greater liberty, a lasting legacy, an independent American judiciary."**

